No. 95-1885 (3)

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
October Term, 1995

Estate of Diane Montag, by and through Michael Montag,
the Personal Representative of the Estate, and
Michael Montag, individually,
Petitioners,

v.

American Honda Motor Company, Inc.,
Honda Motor Company, Ltd., a Japanese corporation, and
Honda R & D Co., Ltd., a Japanese corporation,
Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Eight months ago in *Tibbetts v. Ford Motor Co.*, Honda argued in an Amicus Brief that this Court should review the preemptive effect of the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§1381, *et seq.* (the Safety Act). Honda now advances a variety of factual and procedural arguments to avoid review of the Tenth Circuit's decision in this case. Honda's true motives are clear. Honda does not want the Court to review this case because Honda was successful at the Tenth Circuit. All of Honda's arguments are meritless.

I. HONDA'S STATEMENT OF THE FACTS ATTEMPTS TO ASSERT THAT MRS. MONTAG'S INJURIES WERE INEVITABLE AND THEREFORE THIS COURT SHOULD NOT REVIEW THE CASE. HONDA'S ASSERTIONS ARE INCORRECT.

This is a case brought by the Estate of Diane Montag for injuries which resulted when she was ejected from her automobile despite the fact that she was wearing her seat belt properly. In its statement of facts, Honda has attempted to portray the automobile-train accident as being of such terrific force and at a specific location on the car so as to imply that Ms. Montag's injuries were inevitable whether or not she was ejected.

The train did not plow directly into the door of the Prelude. The brunt of the force was absorbed by the left rear wheel and rear axle. The car was thrown clear of the train. The driver's portion of the passenger compartment remained essentially intact.

Jury Instruction No. 5 told the members of the jury that if they found that Ms. Montag's injuries were caused by contact between her head and a portion of the train (as contended by Honda), they should complete Verdict Form A or, in the alternative, if they found that Ms. Montag's injuries were caused by being ejected from the vehicle, they should complete Verdict Form B. The jurors completed Verdict Form B.

II. REVERSAL BY THIS COURT OF THE PREEMPTION HOLDING WOULD NOT RESULT IN AN ADVISORY OPINION. FURTHER, THE TRIAL COURT'S EVIDENTIARY RULINGS WERE PROPERLY CHALLENGED IN THE TRIAL COURT AND PRESERVED FOR APPEAL.

Honda has also attempted to evade direct consideration of the preemption issue by raising two procedural issues unsuccessfully advanced at the Tenth Circuit level: that the "independent grounds" for the Court's exclusion of airbag evidence renders the preemption issue moot; and that Montag did not preserve the evidentiary issues by making an offer of proof or otherwise submitting the disputed testimony and exhibits into evidence. Both of these assertions are incorrect.

The trial court entered an initial Scheduling Order on May 28, 1992, which required Honda to file a motion on preemption no later than December 1, 1992, or the defense would "be deemed abandoned." Honda did not file any such motion by that date. On March 1, 1993 (two years prior to the close of discovery) Honda produced various internal documents

and engineering studies related to its efforts to select a passive restraint system to meet the minimum requirements of Federal motor vehicle safety standard 208.

Honda, having allowed the Court's deadline for a motion regarding the preemption issue to have passed, realized after the depositions of their employees that in order to bar that testimony and prevent damaging language contained in their own internal documents from being shown to the jury, Honda would need to feign surprise regarding the airbag issue. In reviewing the entire history of the proceedings in this matter, it is impossible to believe after two years of discovery which included other deposition references to airbag technology and hundreds of pages of Honda documents containing references to and discussion of airbag technology that the Honda Defendants were surprised Plaintiff intended to present to the jury the internal Honda documents that unfavorably compared the cheap and ineffective system which they had installed in the Montag vehicle to a manual belt/airbag system which their engineers clearly preferred.

As a result of Honda's alleged "surprise", Honda filed its Motion in Limine claiming one of the Plaintiff's experts was going to be called to testify regarding the feasibility of airbag technology.

While Honda's Motion in Limine was pending, Montag filed a designation of video tape deposition testimony of Honda's employees to be played for the jury at the time of trial. These designations included testimony regarding airbag technology, and Honda's employees reading aloud from

portions of Honda's internal documents regarding the superiority of a manual seat belt system in combination with an airbag when compared to the door-mounted seat belt system adopted by Honda.

This designation of testimony was received by the trial court before the arguments on Honda's Motion in Limine. Prior to the issuance of the Order in Limine, Honda filed objections based upon their Motion in Limine to the portions of the videotaped depositions that concerned the testimony and Honda documents which referred to airbags.

After entering the Order on Honda's Motion in Limine, the trial court then ruled on Honda's objections to specific testimony and documents. As such, the evidentiary issues based on the trial court's written preemption order were properly before the trial court and were properly preserved for appeal.

The Montag Estate, in its Opening Brief and its Reply Brief at the Tenth Circuit argued the above facts regarding Honda's lack of surprise with regard to the airbag evidence, and presentation and preservation of the evidentiary issues.

In its Opening Brief to the Tenth Circuit, the Montag Estate set forth in detail the trial court's knowledge of the specific evidence which was being barred by the Order in Limine (Opening Brief Plaintiffs/Appellants, pp. 13-15).

After Honda's Tenth Circuit Brief questioned whether or not the evidentiary issues raised by the trial court's

preemption decision were properly preserved, the Montag Response Brief made a detailed recital of the discovery and procedural history of the case and stated:

> A review of the trial transcript should make it fairly clear that the renewal of Montag's objections would have been futile and would have resulted in a "needless provocation of the trial judge" [*United States v. Mejia-Alarcon*, 955 F.2d 982, 986-988 (10th Cir. 1993)].

Despite these issues being extensively discussed, briefed and addressed in oral argument by both Montag and Honda, the Tenth Circuit made no mention of these issues in its opinion.

Assuming that the trial court was correct that Plaintiff had not properly endorsed the airbag issue, the alleged "independent grounds" to exclude airbag evidence would not prevent a re-trial should this Court reverse on the preemption issue.

The late endorsement ground cited by the trial court in support of excluding airbag evidence was solely for the purpose of preventing unfair surprise at trial to the Honda Defendants. If this Court were to reverse the preemption holding of the trial court and remand this matter for re-trial with the airbag evidence reinstated, Honda could not now claim, nearly three years later, any "surprise" based on Montag's intent to use the testimony of Honda's employees and Honda's own internal documents.

A retrial would require a new scheduling order and opportunities to endorse witnesses and experts would arise. The so-called "independent grounds" would no longer be at issue.

The documents and testimony in question were offered into evidence and were excluded by the Court. There was no hint that the ruling was subject to reconsideration. Renewal of Montag's objections to the trial court's Order in Limine regarding the evidence would have been futile and would have resulted in needless provocation of the trial judge and a distraction to the fact finders. As such, Montag was not required to renew objections or offer evidence which had been previously excluded. *See*, *United States v. Mejia-Alarcon*, *supra*; and *Sprynczynatk v. General Motors*, 771 F.2d 1112, 1118-1119 (8th Cir. 1985).

The "independent grounds" on which the trial court's decision was partially based would not survive a reversal by this Court on the preemption issue and, thus, this Court's opinion on the preemption issue would not be an advisory opinion. Further, the necessary evidentiary issues which flowed from the trial court's erroneous preemption opinion have all been properly objected to and preserved. On any new trial, Montag would be entitled to a reversal of the trial court's previous orders. As such, the case before this Court properly presents the preemption question.

III. CERTIORARI SHOULD BE GRANTED AS THERE IS A CLEAR CONFLICT BETWEEN SEVERAL STATE COURTS OF LAST RESORT

AND FEDERAL COURTS OF APPEAL REGARDING THE AIRBAG PREEMPTIVE EFFECT OF THE SAFETY ACT.

Honda attempts to distinguish the holdings of the Eleventh Circuit, in *Doyle v. Volkswagenwerk Aktiengelellchaft*, 81 F.3d 139 (11th Cir. 1996); and *Hernandez-Gomez v. Leonardo*, 917 P.2d 233 (Ariz. 1996), by claiming that those cases are not "no airbag claims". This is true in so far as it goes. However, the issue before the Court is not whether "no airbag claims" are preempted by the Safety Act. The issue is whether the Safety Act preempts common law claims of defective design.

The Eleventh Circuit has recently stated that the Safety Act does not preempt common law claims based on the design of passive restraint systems:

> . . . This circuit has expressly held that the standards promulgated under the National Motor Vehicle Safety Act do *not* preempt common law claims. [citations omitted]

Doyle v. Volkswagenwerk Aktiengelellchaft, *supra*, at 141 (emphasis in the original).

Recently, the Arizona Supreme Court in *Hernandez-Gomez v. Leonardo*, *supra*, stated:

> Any preemptive effect of 15 U.S.C. §1392(d) is limited to those state crashworthiness standards applicable to a

> particular aspect of vehicle or vehicle equipment performance, in terms of forces and accelerations, measured on anthropomorphic dummies in test crashes, when there is a federal standard already applicable to the same aspect of performance. . . . If Volkswagen is found liable in tort under the theory claimed by Plaintiff, there will be no conflict with federal law. It was possible for Volkswagen to both comply with federal law and be found liable in tort under Plaintiff's theory. Therefore, a finding of liability under state law would not interfere with or obstruct Congress' chosen methods of accomplishing the objectives set by the Safety Act.
>
> Accordingly, we find there is neither express nor implied preemption of Plaintiff's claim. . . .

Id. at 248.

Honda did not contend (nor would it be possible for them to contend) that other holdings by state courts of last resort are not in conflict with the Tenth Circuit's ruling in this case. *Tibbetts v. Ford Motor Co.*, 665 A.2d 345 (N.H. 1995), *cert. denied* 116 S. Ct. 773, *rehrg. denied* 116 S. Ct. 1036 (1996); was a no airbag case in which the New Hampshire Supreme Court unanimously found a "no airbag" claim was not preempted by the Safety Act.

Similarly, in *Wilson v. Pleasant*, 660 N.E.2d 327 (Ind. 1995) the Indiana Supreme Court held that "no airbag" claims were not preempted stating:

> We reject, as did the Court of Appeals, GM's argument that Plaintiff's airbag claim is expressly pre-empted by the Safety Act. After a careful study of the United States Supreme Court decisions in *Cipollone* and *Myrick*, we hold that the §1397(k) pre-emption clause entirely forecloses implied pre-emption in this case and permits Plaintiff's airbag claim to go forward. And even if we applied the principles of implied pre-emption analysis as restated in *Myrick*, we conclude that it would be improper to imply pre-emption here.

Id. at 339.

There is a clear conflict between the Tenth Circuit's opinion in this case and holdings of the Eleventh Circuit, and the courts of last resort in the states of Arizona, Indiana, and New Hampshire. This Court should resolve these conflicts now, not wait for further disagreements among the lower courts.

CONCLUSION

For the reasons stated herein and in the original Petition for Certiorari, the Petition should be granted.

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